

**Comments of the
NATIONAL CONSUMER LAW CENTER¹
on behalf of its Low Income Clients
and
PUBLIC CITIZEN²
on**

**Office of the Comptroller of the Currency
Interim Final Rule On
Office of Thrift Supervision Integration Pursuant to the Dodd-Frank Wall Street
Reform and Consumer Protection Act
RIN 1557-AD47
Docket ID OCC-2011-0016
76 Fed. Reg. 48950 (Aug. 9, 2011)**

Submitted Oct. 11, 2011

Thank you for the opportunity to comment on the Interim Final Rules integrating the Office of Thrift Supervision (OTS) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).

We are writing to comment on the rule preempting state laws as applied to a federal savings association that acts as a fiduciary, including as trustee, executor, administrator or guardian. The fiduciary preemption rule is outside of the authority of the Office of the Comptroller of the Currency (OCC) under the Home Owner's Loan Act (HOLA) and the Dodd-Frank amendments to that Act. The OCC has offered no justification for preempting important consumer protections governing services to persons who have put their trust in a fiduciary, especially in an area traditionally governed by state law where there appear to be no federal standards that apply.

I. The Interim Rule Preempts a Broad Swath of State Laws Governing Trustees, Executors, Administrators, Guardians and Other Fiduciaries

The OCC recognizes that the Dodd-Frank amendments to HOLA require that OTS preemption rules be revisited. We support the Interim Final Rules to the extent that

¹ The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, providing legal expertise on consumer law issues to public and private attorneys, policy makers, and consumer advocates across the country, with a special focus on low-income consumers. NCLC publishes a series of 18 practice treatises consumer laws, including Cost of Credit: Regulation, Preemption and Industry Abuses. NCLC's attorneys have been closely involved with the enactment of and regulations under virtually all federal laws affecting consumer credit since the 1970s. These comments were written by Lauren Saunders.

² Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen is concerned that the OCC's interim final rule would oust critical consumer protections afforded by state law and state officials' enforcement efforts.

they remove certain “occupation of the field” statements on federal preemption and replace a number of OTS preemption rules with a simple statement that federal savings associations are governed by the same preemption rules as national banks. These changes are dictated by provisions of Dodd-Frank that clarify that HOLA does not occupy the field in any area of state law,³ and that the preemption standards applicable to federal savings associations are those applicable to national banks.⁴

Yet the OCC strays from this approach without explanation with regard to the preemption of state laws governing fiduciary operations.⁵ The Interim Final Rule provides that “the OCC intends to give Federal savings associations maximum flexibility to exercise their fiduciary powers in accordance with a uniform scheme of Federal regulation. Accordingly, Federal savings associations may exercise fiduciary powers as authorized under Federal law, including this part, without regard to state laws that purport to regulate or otherwise affect their fiduciary activities, except to the extent provided in 12 U.S.C. 1464(n) ...”⁶

The rule preempts a wide variety of state laws governing fiduciaries, including those covering:

- Fiduciary qualifications, registration and annual reporting;
- Duties of fiduciaries to their beneficiaries, including the duty of loyalty and the duty of care (e.g., the prudent investor rule);
- Requirements to maintain a place of business within the state if they wish to provide services to beneficiaries in that state, or if they wish to file suit in a court of that state;
- Disclosure by fiduciaries of their financial strength and any relevant conflicts of interest;
- Advertising and marketing by fiduciaries;
- Fees that fiduciaries may charge for various types of services; and
- The types of activities in which fiduciaries may or may not engage.⁷

These are all important protections that have no counterpart in federal law. Activities that would be free of state law protections include acting as a guardian for the elderly or disabled, management of trust accounts (such as a trust for a family farm divided among children), investment decisions and investment advice to trust beneficiaries, administration of an inter vivos trust or a testamentary trust for the benefit of the designated beneficiaries, and handling of wills and estates.

³ 12 U.S.C. § 1465(b).

⁴ 12 U.S.C. § 1465(a).

⁵ The OCC also republished, without change, Parts 190 (preemption of state usury laws) and 191 (preemption of state due-on-sale clauses). We do not comment on those regulations but note that they rely on additional statutory authority not available for the preemption of state fiduciary laws.

⁶ 12 C.F.R. § 150.136(a).

⁷ See 12 C.F.R. § 150.136(b).

II. The Fiduciary Preemption Rule Exceeds the OCC’s Authority Under HOLA as Amended by Dodd-Frank

OTS preemption determinations under HOLA cannot be carried over wholesale to the OCC. HOLA’s preemptive effect has been amended and the regulations must be changed so that they are consistent with the OCC’s current authority. The OCC offers no justification for this sweeping preemption of fiduciary laws, and does not explain the source of its authority.

A. OCC Cannot Occupy the Field

As noted above, the OTS’s position that it was entitled to occupy the field and sweepingly preempt state laws in various areas was repudiated by Dodd-Frank. Yet the OCC views this amendment as meaningless, requiring only cosmetic changes to the OTS fiduciary preemption rule. The interim final rule removes the “occupy the field” statement from the regulation without making *any* substantive changes. The rule still occupies the field of state fiduciary law; it simply does not announce that it is doing so.

Without any authority under HOLA to occupy the field,⁸ preemption can only be justified based on traditional preemption principles or the Dodd-Frank preemption requirements. Neither justifies the fiduciary preemption rule.

B. The Same Preemption Standards Apply to Federal Savings Associations and National Banks

HOLA now provides:

*Any determination by a court or by the Director or any successor officer or agency regarding the relation of State law to a provision of this chapter or any regulation or order prescribed under this chapter shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.*⁹

“This chapter” is all of HOLA.¹⁰ Notably, this provision applies to preemption of *any* state law, not merely state consumer financial laws that have special preemption rules.¹¹

The OCC blatantly ignores this requirement. While it appropriately incorporates National Bank Act (NBA) preemption rules in other parts of the Interim Final Rule, it adopts a preemption standard for fiduciary activities by federal savings associations that is the exact opposite of the NBA standard. There is no fiduciary preemption rule for national banks. They may only act as fiduciaries “when not in contravention of State or local law.”¹²

⁸ HOLA did not justify occupying the field even before the Dodd-Frank amendments.

⁹ 12 U.S.C. § 1465(a) (emphasis added).

¹⁰ See 12 U.S.C. § 1461.

¹¹ See 12 U.S.C. § 25b.

¹² 12 U.S.C. §92a.

Though there are slight differences between the HOLA and NBA provisions authorizing fiduciary activities, the HOLA provision is consistent with the Dodd-Frank mandate that the same preemption rules apply to both. The HOLA fiduciary provision does not preempt state law and in fact ties federal savings associations' fiduciary powers to the authority of state entities "to act under the laws of the State in which the Federal savings association is located."¹³

Under standard rules of statutory construction, the clear, specific and more recent Dodd-Frank provision governing the equivalent preemption standards for national banks and federal savings associations governs over any possible indirect implication that the OCC has the power to impose a different preemption standard for fiduciary activities by federal savings associations.

C. The OCC Has Not Followed the Preemption Standards for State Consumer Financial Laws

States have a variety of laws governing fiduciary activities, many of which qualify as "state consumer financial laws" under Dodd-Frank.¹⁴ Certainly many activities by trustees, executors, administrators, guardians and other fiduciaries involve "accounts" or "financial transactions" that are "directly and specifically" regulated "with respect to a consumer."¹⁵

Yet the OCC makes no attempt to comply with the Dodd-Frank requirements. The OCC can preempt State consumer financial laws under HOLA "*only if*"¹⁶ it finds that, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."¹⁷ Further, the OCC can issue a preemption regulation only on a "case-by-case basis" by determining "the impact of a particular State consumer financial law" or one with "substantively equivalent terms";¹⁸ after consulting with the Consumer Financial Protection Bureau;¹⁹ and after finding that "substantial evidence, made on the record of the proceeding" supports the "specific finding" that the *Barnett Bank* prevent/significantly interfere standard has been met.²⁰

¹³ 12 U.S.C. § 1464(n)(1).

¹⁴ 12 U.S.C. § 25b(a)(2).

¹⁵ *Id.*

¹⁶ 12 U.S.C. § 25b(b)(1). State laws are also preempted if they have a discriminatory effect on federal savings associations or if they conflict with federal laws other than HOLA. *Id.* There is no suggestion that either of those circumstances is present for the fiduciary laws being preempted.

¹⁷ *Id.* § 25b(b)(1)(B).

¹⁸ *Id.* § 25b(b)(3)(A).

¹⁹ *Id.* § 25b(b)(3)(B).

²⁰ *Id.* § 25b(c).

The OCC has not followed any of these requirements. It has not reviewed any particular state laws on a case-by-case basis; has not applied the prevent/significantly interfere *Barnett Bank* standard; has not consulted with the CFPB; and has not conducted a proceeding with substantial evidence on the record.

In a prior preemption rulemaking, the OCC claimed that it could ignore Dodd-Frank because Congress did not intend to apply the Dodd-Frank amendments retroactively to overturn existing regulations.²¹ The OCC ignored the clear grandfather clause that preserves prior regulations only as to contracts entered into before the effective date of Dodd-Frank.²² If Dodd-Frank did not apply to earlier regulations, the OCC would have no need to remove the “occupy the field” statements from the OTS regulations or to harmonize the federal savings association preemption standards in other areas to the national bank standards. The OCC gives no explanation as to why it can pick and choose among which Dodd-Frank requirements it will follow.

III. Conclusion

The OCC’s fiduciary preemption rule ignores Congress’s clear instructions, and the interim final rule is outside of the OCC’s authority. The OCC should rescind the fiduciary preemption regulation and replace it with a statement that fiduciary activities by federal savings associations are preempted to the same extent as they are for national banks.

²¹ See 76 Fed. Reg. 30557, 30563 & n.28 (May 26, 2011).

²² See 12 U.S.C. § 5553. This issue is discussed in greater detail in our comments on the first round of OTS integration preemption rules, available at <http://www.nclc.org/images/pdf/preemption/occ-preemption-comments-6-27-11.pdf>.